

RESTRICTIONS ON RURAL ELECTRIFICATION COOPERATIVES*

RURAL electrification cooperatives have made spectacular progress during the last fifteen years in bringing electricity to farm areas.¹ The federal Rural Electrification Administration has fostered this development through loans² and technical assistance.³ By conditioning its loans on certain operational standards and closely supervising co-op development, it has not only facilitated expansion of services, but has been able to effect a marked degree of efficiency in cooperative management.⁴

*Petition of White Mountain Power Co., 71 A. 2d 496 (N.H. 1950).

1. When the REA program was initiated in 1935, only 10 per cent of the nation's farms enjoyed electrical service. By 1950, this figure had risen to 86.3 per cent, although during the war manpower and materials were not available for extending rural electrification. 57 per cent of the electrified farms received service from REA financed systems. Private utility expansion in rural areas has been stimulated by the REA program. REA ANNUAL REPORT, (1935-36); REA ANNUAL REPORT 4 (1949); REA, ANNUAL REPORT 2 (1950). And see generally, Wickard, *Power Revolution on the Farm*, N.Y. Times Magazine, p. 15, Sept. 9, 1951.

2. "In sixteen years REA has made loans amounting to more than \$2.35 billion to 1,076 borrowers, including 952 rural electric cooperatives. The latter have borrowed 95 per cent of REA's loan funds. REA borrowers have built more than 1.1 million miles of line and serve nearly 3.5 million rural consumers, of whom three-fourths are farmers." Wickard, *supra* note 1, at 38.

3. In recent years, REA has placed increasing emphasis on the development of managerial skills in the operation of cooperatives. "In the early stages of co-op development, emphasis was on line building and providing initial service for members. As co-ops near completion of their major construction programs, sound business management becomes relatively more important." REA, ANNUAL REPORT 12 (1949). By 1940, REA's division of Engineering and Operations had succeeded in showing cooperatives how to cut construction costs to *half* of the figures estimated by private utilities in their estimates of the economic feasibility of servicing the same fields. RALL, COOPERATIVE RURAL ELECTRIFICATION IN THE UNITED STATES 4, 5 (1940).

4. In establishing a co-op, the sponsors must first petition REA which rules on the feasibility of the project. If the project is approved, REA may lend up to 100 per cent of the construction cost, taking a mortgage on the lines that are built. If a wholesale power supplier's prices seem excessive, REA will attempt to negotiate on behalf of the co-op. The co-op must choose a project engineer who meets REA approval, and once chosen he must follow REA construction standards. The construction budget as well as monthly financial reports is subject to REA approval. REA enforces standardized systems of accounting and filing. It may make operational recommendations when the relation of costs to revenue seem unsatisfactory. See *ibid.*; MULLER, COOPERATIVE RURAL ELECTRIFICATION 99-103, 109, 118 (1944); BAUER & COSTELLO, PUBLIC ORGANIZATION OF ELECTRIC POWER 163-4 (1949); REA, ANNUAL REPORT 35-7 (1950).

"Thousands of our rural citizens have come to their full stature of leadership through service on rural electric co-op boards. As they rotate in terms of office, they are building a pool of experienced leaders and administrators in rural communities . . . More important, rural electric co-op directors are learning how to exercise leadership in conformity with the democratic processes as they work with and through groups. This addition to the human resources of the community is a by-product of rural electrification, but it is an important one." Wickard, *supra* note 1, at 40.

From the beginning, REA faced a job that private utilities had rejected.⁵ In rural distribution systems, low population density means high costs per consumer and low revenues per line-mile. The cooperatives, however, have met these difficulties, in part by new, cost-cutting methods of construction⁶ and by load building activity to encourage the use of electrical power.⁷ But the real key to economically feasible rural distribution systems has been "area coverage"—the integrated development of a territory which permits more densely populated areas to carry a share of the cost of serving leaner

5. When REA was created, private utilities claimed that all rural residents who could use economically produced electricity were already being served; thus, in their own view no more than 10% of the farms were considered prospective users of electric power by the utilities. *Id.* at 38; 7 AMERICAN PUBLIC POWER ASS'N PROCEEDINGS 139 (1950). Moreover, the private utilities refused to extend rural service unless adequate revenues were guaranteed. Thus, when expansion was undertaken, the terms were burdensome—high rates, requirements that consumers make capital contributions for construction costs, and so on. MULLER, *op. cit. supra* note 4, at 1. Yet after the REA program was under way, there was a marked increase in private utility activity in rural areas. REA, ANNUAL REPORT 15 (1937); see note 1 *supra*.

6. The technological advances achieved include lighter, more durable conductors, new types of cheaper poles with fewer required per line mile, and the industrial development of pole creosoting. MULLER, *op. cit. supra* note 4 at 116. REA has exercised considerable ingenuity in helping its co-ops to lower costs. In one instance in Texas, where pole manufacturers were discriminating against a co-op in refusing to supply its needs, REA authorized a loan to the co-ops to establish their own pole treating plant as the only way to continue the electrification program in that area. *Hearings before Subcommittee of Committee on Interstate and Foreign Commerce on H. R. 1742*, 79th Cong., 1st Sess. 101 (1945).

7. "It is the increasing amount of electricity which farmers are using and plan to use which creates the demand for loan funds to insure adequate, reliable and economical service." Wickard, *supra* note 1, at 42. A major device for load building has been the use of promotional rate structures, as in Arkansas where in 1945 a co-op charged 7 cents per kwh for the first 35 kwh per month, 5 cents for the next 65 kwh, 2½ cents for the next 1000 and 1 cent per kwh for all power in excess of 2000 kwh per month. *Hearings, supra* note 6, at 458. The REA has also successfully used publicity and education to encourage new and wider uses of electricity through publications such as Rural Electrification News. In addition, REA and its parent agency, the Department of Agriculture, have conducted extensive research in new types of electrical farm equipment such as bactericidal lamps, hay dryers and bee-hive heaters. REA has also financed irrigation systems, refrigeration plants and creameries. Finally, farmers have been urged to use electricity at times when neither the urban nor the typically rural demand is at peak, thus permitting economies in co-op operations. See Rural Electrification News, Dec. 1948-Jan. 1949, 7-11.

8. "REA borowers make it a matter of paramount policy that if anyone in the area can have electricity, then everyone in the area is entitled to it—and at the same rates. Each loan is made with the understanding that the borrower balances revenues from the more thickly settled sections to permit lines to be constructed to serve those farms in sparsely populated areas." Wickard, *supra* note 1, at 42.

There is no feasible alternative policy for REA and its cooperatives to follow. To achieve their objective of maximum rural electrification they must eschew the luxury of serving only profitable areas. The logic of this position has been recognized by state public service commissions in working out rural electrification plans for private utilities.

parts. However, effective area integration may require serving areas not strictly rural.⁹

Private utilities have watched with concern the growth of the cooperative form of enterprise as a threat to future markets in potentially lucrative rural territories and a challenge to rate structures, profit margins and established operating methods.¹⁰ To combat this, they have continued "cream-skimming"—serving the more densely populated, richer areas and leaving poorer districts unserved.¹¹ Deliberate obstruction has taken the form of "spite lines"—distribution lines hastily constructed after a cooperative has announced plans for entering an area; these lines may then support claims that the cooperative will duplicate existing distribution facilities.¹²

See *Re Standard Rules for Extension of Rural Electrification Lines*, 18 P.U.R. (N. S.) 380 (Ark. 1937); *Re Extension of Rural Lines of Electric Utilities*, 15 P.U.R. (N. S.) 364, 371 (Wis. P.S.C. 1936).

9. REA's statutory lending power is limited to systems serving customers in rural areas. A "rural area" is defined as "any area in the United States not included within the boundaries of any city, village or borough having a population in excess of 1500 inhabitants." 49 STAT. 1367 (1936), 7 U.S.C. § 913 (1946). REA has interpreted this provision to allow financing of systems, portions of which are in non-rural areas, if the purpose of the system is to extend service to previously unserved rural areas. However, REA must be satisfied that the integrated system will be primarily rural. But although a more rigid interpretation would probably have made many rural extensions impossible, REA's policy has been subject to vigorous attack by private utilities. Solicitor's Opinion No. 4506 (1942) quoted in full in *Hearings before the Subcommittee of the Senate Committee on Appropriations on 1951 Appropriations for Dept. of Agriculture*, 81st Cong., 2d Sess. 1374, 1383-6 (1950). See also note 41 *infra* and text.

10. See, e.g., *Hearings, supra* note 9, at 1306. A cooperative financed by federal funds has certain advantages over private utilities. Overhead costs are lower, it does not have to pay for risk capital, interest rates are somewhat lower, it does not have to pay federal taxes, 44 STAT. 99 (1926), as amended, 26 U.S.C. § 1808 (1946) (excise tax on securities); 52 STAT. 480 (1938), as amended, 26 U.S.C. § 101(10) (1946) (corporate income tax); 52 STAT. 573 (1938), 26 U.S.C. § 3411(c) (1946) (excise tax on electrical energy); and in many states a nominal license fee is paid in lieu of all state taxation. See, e.g., KY. REV. STAT. ANN. § 279.200 (1943); LA. REV. STAT. tit. 12, § 325 (1950). Cooperatives can call upon their members for free services such as the donation or clearing of rights of way. Despite these advantages, however, the competitive position of the co-ops is relatively weak when private companies retain advantages of size and integration.

11. Cooperatives have complained of this practice since the beginning of their development. See REA, ANNUAL REPORT 16 (1937), and note 8 *supra*.

12. In one such case a distribution line was built by a private utility when a co-op announced plans to enter the area. It was a single line, energized, and running for ten miles, yet it served no customers. At the end of this line a single light bulb burned day and night as "... a token that the line was rendering a needed public utility service." REA, ANNUAL REPORT 36 (1937).

While "spite-lines" and "cream-skimming" are the most common practices, private utilities have also resorted to "blocking" co-op development by pre-empting needed rights of way. *Id.* at 37; see also REA, ANNUAL REPORT 5 (1938). Publicity is another channel that has been exploited. During World War II, private utilities sponsored advertising accusing REA co-ops of wasting vital copper. These charges were so widespread that they had to be refuted by the WPB. REA, ANNUAL REPORT 11 (1942). Nor is publicity confined to the locality in which a particular controversy occurs; last year the New York

The conflict is also carried on in power generation and transmission. Most of these facilities are owned by private utilities; the cooperatives depend on them for their power supply.¹³ In some instances cooperatives are charged inordinately high or frankly discriminatory rates.¹⁴ Elsewhere, the generating or transmitting utility may insist upon a resale differential between the co-op's rates on electricity for rural industry and co-op rates charged domestic consumers.¹⁵ The effect of this is to deny the cooperative the opportunity to balance poor revenue-producing domestic users against a more profitable industrial customer.¹⁶ And cooperatives' efforts to construct their own facilities have also been fought with the claim of duplication.¹⁷

Times carried a full page advertisement claiming "unfairness" of REA to private utilities in South Carolina. N. Y. Times, May 21, 1950, p. 86. In Missouri, the fight between Southwestern Power Authority and the co-ops on the one hand and private utilities on the other, see note 17 *infra*, was marked by an advertising campaign financed by private companies in 40 daily and weekly newspapers. One-third to full-page ads have appeared bi-weekly. 8 PUBLIC POWER 24 n.11 (Nov. 1950); see MULLER, *op. cit. supra* note 4, at 37 n.76. There have been instances where REA itself has answered charges against it. However, neither REA nor the co-ops may have the funds to compete on an equal basis with private utilities in advertising media.

There is no doubt that many counter-charges of private utilities are well founded. Some of the claims rest on differing interpretations by private utilities and REA of the governing statute. See, e.g., N.Y. Times, *supra*; notes 9 *supra*, 17 *infra*.

13. Commercial power companies supplied 57 per cent of all power consumed by REA co-ops in 1949. *Hearings, supra* note 9, at 1186. In 1950, REA borrowers generated only 13 per cent of their requirements and purchased the remainder from power companies and other suppliers. REA-aided rural electric distribution systems paid the power companies \$37,000,000 for electricity in 1950. Wickard, *supra* note 1, at 43.

14. For example, a co-op in Woodward, Oklahoma, claimed that co-ops had been paying between .6 cents and .7 cents per kwh for wholesale power. The same private utility offered needed additional power at .9 cents. Moreover, it agreed to supply power for co-op distribution lines serving a town at 2.6 cents, the same price it would charge customers in the town if it distributed the power itself. *Hearings, supra* note 9, at 1257-58. In Alabama, the Alabama Power Co. refused to reduce its wholesale power rates until the Alabama Electric Cooperative built its own generating and transmitting system. *Id.* at 1273-4.

15. 80 per cent of the power bought by cooperatives from private power sources is subject to resale clauses containing such differentiations. The Arkansas Valley Electric Cooperative, Inc., under a conditional contract, had its bill increased by 21 per cent because it supplied a "non-conforming" customer. *Id.* at 1186, 1260-1.

16. This policy not only hampers the cooperative management, but also interferes with REA's and the Department of Agriculture's attempts to encourage diversified farm uses for electricity which tend to increase agricultural productivity and efficiency. See note 7 *supra*.

17. Section 904 of the Rural Electrification Act, 49 STAT. 1365 (1936), as amended 7 U.S.C. § 904 (1946), provides that funds can be loaned by the REA for generating and transmitting systems only if these systems will serve persons not already receiving central station service. A dilemma is thus created since, although existing private transmission lines may be insufficient to carry the load required by the co-ops, the building of parallel lines may open REA and its co-ops to the charge of physical duplication. The dilemma is sharpened where cooperative transmitting facilities may plan to serve customers

Private utilities have looked to the courts to bolster and enforce their position. Litigation is an important tactic, both in the form of conventional equity actions,¹⁸ and as an administrative proceeding before public utility regulating agencies.¹⁹ In equity proceedings, private utilities may face a jurisdictional obstacle making relief against cooperative expansion impossible. Utilities are not judicially protected from co-ops' lawful competition.²⁰ And, lacking the protected status of a legal monopoly, the utility may have no standing to attack even unauthorized competitive activities of cooperatives not subject to utility commission regulation.²¹ Moreover, courts may hold that cooperatives

who formerly bought power from private companies. REA, in granting loans, has adopted the policy that where, after investigation, it appears that the primary purpose of rural electrification will be served by a federated cooperative's building generating or transmitting facilities, the loan will be granted. See REA, ANNUAL REPORT 8-10 (1949); *cf.* notes 9 *supra*, 41 *infra*. Compare the recent statements of Claude R. Wickard, U.S. Rural Electrification Administrator: "REA's policy in making loans for generation or transmission requires that borrowers show that *more adequate or more economical* power would result than is now available from existing sources." Wickard, *supra* note 1, at 42 (emphasis added).

Private utilities feel that this interpretation of the law is incorrect. However, jurisdictional obstacles have prevented them from obtaining a judicial determination of the question. See pp. 1438-9. In South Carolina, REA granted a loan to Central Electrical Power Cooperative, a federation of all the co-ops in the state, to build transmission lines over which power generated at the Santee-Cooper dam, a public project, would be carried. The private utilities unsuccessfully protested to the REA administrator. They claimed that their lines were adequate and the proposed lines of the Central would be duplicative. But they did not bring suit against the administrator because of the jurisdictional problem. Communication to the YALE LAW JOURNAL from Arthur M. Williams Jr., Staff Counsel, South Carolina Electric & Gas Co., dated June 5, 1950 in Yale Law Library. *Cf.* Carolina Power & Light Co. v. S.C. Pub. Serv. Authority, 20 F. Supp. 854, 860 (E.D.S.C. 1937); *aff'd*, 94 F.2d 520 (4th Cir.), *cert. den'd*, 304 U.S. 578 (1938). And a suit against Santee-Cooper in the State Courts failed in part on the same ground. South Carolina Elec. & Gas Co. v. S.C. Pub. Serv. Authority, 215 S.C. 193, 54 S.E.2d 777, 781 (1949).

In Missouri a similar problem exists. A "super" co-op plans to build transmission lines to carry power generated by Southwestern Power Authority, a federal project. The private utilities claim that no unserved rural customers will be served thereby. *Hearings, supra* note 9, at 1109, 1198-1207. Ten utilities have brought an injunction proceeding to prevent the building of transmission lines and steam plants under the plan. Kansas City Power & Light Co. v. Chapman, Civil No. 4276-50 (D.D.C. pending). This case has an additional element. The utilities claim that since Congress in 1944 specifically refused to authorize Southwestern Power Authority to build these same transmission facilities, the present plan attempts to circumvent the congressional mandate.

18. See cases cited in note 26 *infra*.

19. See note 25 *infra*.

20. *Cf.* Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Georgia Power Co. v. Tennessee Valley Authority, 14 F. Supp. 673 (N.D. Ga. 1936).

21. *Cf.* Carolina Power & Light Co. v. S.C. Pub. Serv. Authority, 94 F.2d 520 (4th Cir.), *cert. denied*, 304 U.S. 578 (1938); South Carolina Elec. & Gas Co. v. South Carolina Pub. Serv. Authority, 215 S.C. 193, 54 S.E.2d 777 (1949); Missouri Power & Light Co. v. Lewis County Rural Electric Cooperative Ass'n, 235 Mo. App. 1056, 149 S.W.2d 881 (1941). Compare Tennessee Electric Power Co. v. Tennessee

need not obtain public service commission authorization in the absence of an explicit statutory requirement.²² Since practically all of the consumers served by the cooperatives are members, courts have reasoned, the interests of consumer and supplier coincide. Thus, the cooperative form of enterprise without regulation presumably takes care of consumer interest, which would otherwise be protected by commission regulation.²³

However, utilities enjoy greater success where state law provides for public service commission jurisdiction over some phase of cooperative activity.²⁴ Here is a forum where the private utility is free from the jurisdictional obstacles attendant on a conventional action. The utility may appear as a formal party, or its interests may be represented by the commission itself in proceedings against unauthorized co-op activity.²⁵ And where the same commission regulates both private utility and co-op, that fact may confer standing on the utility to challenge in the courts a co-op's deviation from statutory requirements.²⁶

Valley Authority, 306 U.S. 118, 140-43 (1939). *But cf.* *Frost v. Corporation Commission*, 278 U.S. 515 (1929); *City of Campbell, Mo. v. Arkansas-Missouri Power Co.*, 55 F.2d 560 (8th Cir. 1932); *see* *Iowa Southern Utilities Co. v. Cassill*, 69 F.2d 703, 704 (8th Cir. 1934); *Tennessee Public Service Co. v. City of Knoxville*, 170 Tenn. 40, 45, 91 S.W.2d 566, 568 (1936). For judicial inroads on the scope of the *Frost* case, *see* *Carolina Power & Light Co. v. S.C. Pub. Serv. Authority*, *supra*, at 524-5; *Alabama Power Co. v. Ickes*, 302 U.S. 464, 484-5 (1938). For *Frost's* new lease on life, *see* *Kansas City Power Co. v. Chapman*, Civil Action No. 4276-50, D.D.C., Jan. 22, 1951, (mimeographed) p. 3 (denial of motion to dismiss).

22. *E.g.* *Alabama Power Co. v. Cullman County Electric Membership Corp.* 234 Ala. 396, 174 So. 866 (1937); *S.C. Elec. & Gas. Co. v. S.C. Pub. Serv. Authority*, 215 S.C. 193, 54 S.E.2d 777 (1949).

23. Note, 132 A.L.R. 1495 (1941); *see* Packel, *Commission Jurisdiction over Utility Cooperatives*, 35 MICH. L. REV. 411, 429-31 (1937); *Alabama Power Co. v. Cullman County Electric Membership Corp.*, 234 Ala. 396, 402, 174 So. 866, 871 (1937). And *see* discussion *infra* of *Petition of White Mountain Power Co.*, 71 A.2d 496 (N.H. 1950).

24. *See* cases cited in note 26 *infra*.

25. For example, these cases were decided without questioning of the jurisdiction: *Nightingale v. San Miguel Power Ass'n*, 48 P.U.R. (N. S.) 173 (Colo. P.U.C. 1943); *State ex rel. Consumers Pub. Serv. Co. v. Pub. Serv. Comm'n*, 352 Mo. 905, 180 S.W.2d 40 (1944) (private utility opposes acquisition of assets of another private utility by co-op); *Jersey Cent. Power & Light Co. v. Tri-County Rural Elec. Co.*, 38 P.U.R. (N. S.) 48 (N.J. P.U.C. 1941) (adjustment of territorial dispute between utility and co-op). The commissions also afford a forum for the co-ops to challenge the utilities. *Re West Tenn Power & Light Co.*, 18 P.U.R. (N. S.) 369 (Tenn. R.R. & P.U.C. 1937) (co-op intervened to prevent the commission from granting permission to a private utility to extend its lines into the co-op's project area).

26. *Cf.* *Frost v. Corporation Commission*, 278 U.S. 515 (1929); *see* *Carolina Power & Light Co. v. S.C. Pub. Serv. Authority*, 94 F.2d 520, 524-5 (4th Cir. 1938); *compare* *South Carolina Elec. & Gas Co. v. S.C. Pub. Serv. Authority*, 215 S.C. 193, 205-13, 54 S.E.2d 777, 782-5 (1949). *But cf.* *Missouri Power & Light Co. v. Lewis County Rural Electric Cooperative Ass'n*, 235 Mo. App. 1056, 1061-5, 149 S.W.2d 881, 884-6 (1941).

Where such forums are available, state statutes providing for the creation of REA cooperatives²⁷ can be used as a basis for attacking them.²⁸ In most states, these statutes contain one or more of three limitations upon activity:²⁹ (1) a cooperative cannot serve more than 10% non-members;³⁰ (2) it may be limited to serving statutorily-defined rural areas;³¹ and (3) it may be prohibited from serving customers already receiving service.³² Any of these limitations, restrictively construed, might inhibit the development of an integrated cooperative system.³³

27. 27 states have rural electrification laws. See notes 29-32 *infra*.

28. Cf. Petition of White Mountain Power Co., 71 A.2d 496 (N.H. 1950).

29. Four states of the 27 having rural electrification cooperative statutes impose none of the three restrictions. KAN. GEN. STAT. § 17-4601—17-4633 (Cum. Supp. 1947); MINN. STAT. ANN. § 308 (Cum. Supp. 1950); NEB. REV. STAT. § 70-701—70-738 (1950); N.C. GEN. STAT. § 117-6—117-27 (1943).

30. Of 27 states which have rural electrification cooperative laws, 14 have limitations on service to non-members. ALA. CODE tit. 18, § 33 (1940); KY. REV. STAT. ANN. c. 279.120 (Baldwin 1943); LA. REV. STAT. tit. 12, § 303 (1950); MD. CODE ANN. 463 (Cum. Supp. 1947); MO. REV. STAT. ANN. § 5388 (Cum. Supp. 1949); MONT. REV. CODES ANN. § 14-503 (1947); N.H. REV. LAWS c. 273, § 52, I (1942); N.M. STAT. ANN. § 48-403 (1941); N.Y. RURAL ELEC. COOPERATIVE LAW art. 2, § 14 (1948); OKLA. STAT. ANN. tit. 18, § 437.2 (Supp. 1949); S.C. CIV. CODE § 8555-93 (1942); S.D. LAWS 1947, c. 33, § 4; TEX. REV. CIV. STAT. art. 1528(b), § 4 (Vernon 1925); VA. CODE tit. 56, § 56-225 (1950). Of these, Alabama, Louisiana, South Dakota and Virginia permit the service of a considerably larger proportion of non-members through later-acquired facilities. New York requires all consumers to become members within a year of the beginning of service.

31. Of the 27, 16 state statutes contain rural area limitations. ARK. STAT. § 77-1103 (1947); FLA. STAT. ANN. § 425.03 (1943); GA. ANN. CODE § 34A-103 (Cum. Supp. 1947); IND. STAT. ANN. § 55-4403 (Burns Cum. Supp. 1949); MD. CODE ANN. § 463 (Cum. Supp. 1947); MO. REV. STAT. ANN. § 5388 (Cum. Supp. 1949); MONT. REV. CODES ANN. § 14-503 (1947); N.M. STAT. ANN. § 48-403, 48-431 (1941); N.Y. RURAL ELEC. COOPERATIVE LAW art. 1, § 2 (1948); N.D. REV. CODE § 10-1301, 10-1302 (1943); OKLA. STAT. ANN. § 437.2 (Supp. 1949); PA. STAT. ANN. tit. 14, § 263 (1938); S.C. CIV. CODE § 8555-93 (1942); S.D. LAWS 1947, c. 33, § 4; TEX. REV. CIV. STAT. art. 1528(b), § 2(8) (Vernon 1945); WIS. STAT. § 185.24 (1947). Cf. note 9 *supra*.

32. Of the 27, 9 state statutes do not permit cooperatives to serve customers who are already receiving central station service. ARK. STAT. § 77-1112 (1947); GA. ANN. CODE § 34A-103 (Cum. Supp. 1947); IND. STAT. ANN. § 55-4403 (Burns Cum. Supp. 1949); ME. REV. STAT. c. 47, § 24 (1944); N.H. REV. LAW c. 273, § 52, I (1942); N.D. REV. CODE § 10-1302 (1943); PA. STAT. ANN. tit. 14, § 263 (1938); TEX. REV. CIV. STAT. ANN. art. 1528(b), § 3 (Vernon 1945); WIS. STAT. § 185.24 (1949).

The model state rural electrification law prepared by REA contains the "rural area" and the "10% non-member" restrictions. REA, A DRAFT OF A RURAL ELECTRIFICATION COOPERATIVE ACT §§ 2, 3(d), 31 (1939).

33. According to H. S. Bennion, Managing Director of the Edison Electric Institute, a large number of acquisitions of private utilities serving towns of 1500 or more have been made by the co-ops. Letter of H. S. Bennion to P. L. Smith, National Ass'n of Elec. Cos., April 5, 1950; EDISON ELECTRIC INSTITUTE, INCOMPLETE, UNVERIFIED COMPILATION OF REA ACQUISITIONS (undated).

In *Petition of White Mountain Power Co.*,³⁴ for example, the New Hampshire Public Service Commission in a hearing to approve the stock sale of a small private utility raised the questions of whether the "10% non-member"³⁵ and "prior service"³⁶ limitations prohibited a cooperative from acquiring control in this way.³⁷ Under New Hampshire law, the stock transfer required the approval of the Commission.³⁸ The Commission certified the question of whether or not the sale to the cooperative violated either restriction to the state supreme court.

The court upheld the legality of the securities purchase. The majority reasoned that the purpose of the statutory restriction on service to non-members was to assure consumer control of rates, an alternative to Commission regulation. Since a transfer of securities, as distinguished from an outright sale of assets, would preserve the corporate entity of the acquired utility, its rates would continue to be regulated by the Commission. Thus the purpose of the "10% non-member" limit would not be violated.³⁹ And the court added that the prohibition against supplying customers who already had electric service was designed to prevent wasteful duplication and competition. No duplication would occur here. Thus the acquisition was valid from this standpoint as well.

The *White Mountain Power* case points up at least a judicial sympathy for cooperatives' efforts and at most an awareness of the economic necessities of rural electrification. But economic considerations were not the articulate basis for the court's decision. Rather, weaving an intricate path to avoid conflict with statutory 10% non-member and prior service restrictions, the court employed legal artifice to reach its result.⁴⁰ The use of technical distinctions to escape the statute, or the elaborate scrutiny of facts required to judge literal compliance with its terms, suggests the need for legislative revision of mechanical limitations in the light of experience with cooperative operation.

34. 71 A.2d 496 (N.H. 1950).

35. N.H. REV. LAWS c. 273, § 52, I (1942).

36. *Ibid.*

37. The private utilities had fought the acquisition bitterly. Under a previous plan, the cooperative was to acquire the assets of the White Mountain Power Co. outright. In order to conform to the 10% non-member limitation, it launched a campaign to sign up customers of the company as members of the co-op. When the Public Service Company of N.H., the state's leading private utility, learned of this effort, it began an all-out attack on the plan. The Public Service Company sent telegrams to every town meeting in the White Mountain Power Co. territory stating that the sale of assets could not be accomplished without Commission approval. These telegrams had their effect; the plan was unsuccessful, and the alternative of a securities purchase was conceived. In the hearing on this acquisition before the Public Service Commission, the Public Service Company of N.H. was permitted to intervene over the objection of the co-op. Communication to the YALE LAW JOURNAL from Atlee F. Zellers, Attorney for New Hampshire Electric Cooperative, Inc., dated April 17, 1950 in Yale Law Library.

38. N.H. REV. LAWS cc. 292, 305 (1942).

39. 71 A.2d 496, 502.

40. See *id.* at 504 (dissenting opinion): "The majority opinion holds that form governs substance and that incidental powers override basic limitations."

In interpreting similar provisions in its own statute, the REA has emphasized that the "basic purpose" of the loan as a whole affects its validity. It apparently grants loans to cooperatives when satisfied that the primary purpose of the law—extension of electrification to previously unserved rural persons—will be accomplished.⁴¹ The incidental inclusion of non-rural areas and the acquisition of existing utilities, provided they are necessary to an appropriately integrated operation, are not in themselves grounds for refusing a loan.⁴² A "basic purpose" standard might well be substituted for present mechanical restrictions in state rural electrification statutes.

Although such a standard would be vaguer than existing statutory limitations, its effect might easily be to expedite litigation. The contested issue in a lawsuit would be limited to the general effect of the proposed extension. Time-consuming evidence, such as that presently used to show variations from the literal statutory wording, could be excluded. This workable legislative standard seems clearly preferable, at any rate, to random judicial attempts to mitigate present rigidities.

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41. "Of course, the question as to whether the basic purpose of a proposed loan . . . is to provide electrical service to unserved persons in rural areas is a matter for determination administratively . . . after a thorough consideration of the pertinent facts and circumstances in the case." See letter from the Comptroller General to Congressman Tarver (March 12, 1943) in *Hearings, supra* note 9, at 1336. And see note 17 *supra*.

It is important to note that loans for acquisitions must include funds for service to unserved persons according to REA ruling. Thus, the loan for co-op acquisition of White Mountain Power Co. which had many previously-served customers could be made even under the "no prior service" provision. This is because REA felt that the main purpose of the loan would be to facilitate further extension to unserved rural areas. Interview with Mr. Bernard Gekoski, Office of Solicitor, U.S. Dep't of Agriculture, June 29, 1951. See also notes 9 and 17 *supra*, and see *Missouri Power & Light Co. v. Lewis County Rural Electric Cooperative Ass'n*, 235 Mo. App. 1056, 1062-3, 149 S.W.2d 881, 885 (1941).

However, the limitation on service to non-members over a given percentage of the total membership of the cooperative presents a problem different from the other restrictions. It is not subject to the "basic purpose" test. This provision is designed to assure that the cooperatives which benefit from the statute remain controlled by the people who get electrical service. However, even this provision can prove a difficult burden, for literal adherence, especially where heavily financed utility campaigns are directed against membership drives. See note 37 *supra*. A reasonably flexible legislative solution would be to allow the cooperative a period of time in which to sign up members in the area served by the acquired facilities. If after that time, non-members still exceeded the permissible percentage, then cooperative rates (or appropriate portions of the rate schedule) could be subjected to Public Service Commission jurisdiction at least until the required percentage of members had been obtained.

42. See notes 9, 17, and 41 *supra*.

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